



**Report to the Supreme Court of Texas
On Proposed Revisions to Texas Rule of Civil Procedure 183
Regarding Interpreters**

**Submitted by the Texas Access to Justice Commission
September 14, 2016**

I. INTRODUCTION

The Supreme Court of Texas established the Texas Access to Justice Commission (Commission) in 2001 to serve as the statewide umbrella organization for all efforts to expand access to justice in civil legal matters for the poor. It is the role of the Commission to assess national and statewide trends on access to justice issues facing the poor, and to develop initiatives that increase access and reduce barriers to the justice system.¹

The Commission has a Rules and Legislation Committee (Committee)² with a subcommittee that focuses on language access issues. Language access is an increasingly critical issue in Texas and across the nation.³ The Commission has received complaints about the lack of access for litigants with limited English proficiency (LEP) for many years.⁴ In response to requests from legal aid and pro bono organizations, the State Bar of Texas created the Language Access Fund (LAF) in 2013 to expand language access for legal aid and pro bono LEP clients.⁵ Over the years, these entities have provided the Commission additional anecdotal information on the barriers faced by LEP litigants and witnesses as well as the legal community's lack of knowledge about law and policy governing language access in courts. Laws and policy are inconsistently applied from county to county and court to court.

¹ Supreme Court of Texas Misc. Docket 01-9065, Order Establishing the Texas Access to Justice Commission, April 26, 2001.

² Members are: Justice Brett Busby (chair), Judge Karin Crump, Judge Maria Salas-Mendoza, Judge Jennifer Rymell, Judge Jason Pulliam, Lewis Kinard, Orrin Harrison, Juan Alcala, Marcy Greer, Lisa Hobbs, Marisa Secco, Lonny Hoffman, Julie Balovich, Nelson Mock, Jane Perrieras-Horta, Veronica Carbajal, Brenda Willett, Alissa Gomez, and Jonathan Vickery.

³ The Department of Justice has been focused on the issue for years, as discussed in this report and the access to justice community across the country are increasingly focusing on language access, which is routinely highlighted at national and local access to justice conferences.

⁴ In fact, there has been litigation and at least one Department of Justice complaint brought by Texas legal aid providers on this issue in the recent past. See *Claudia P. Tovar v. 321st District Court of Smith County, Texas; Smith County, Texas; and State of Texas Office of Judicial Administration*, DOJ Complaint No. 356592 (Sep. 11, 2010), <http://www.lonestarlegal.org/tovar%20complaint.pdf> (last visited Sep.14, 2016) and *Doe v. Harris County*, 4:10-cv-02181, (S.D. Tex. June 17, 2010).

⁵ The Language Access Fund provides legal aid and pro bono programs in Texas with funds for interpreter and document translation services for low-income clients.

Coincidentally, not long after the Commission convened the Language Access Subcommittee,⁶ the Texas Supreme Court asked its Supreme Court Advisory Committee (SCAC) to study and make recommendations on Texas Rule of Civil Procedure 183, which governs the appointment of interpreters.⁷ The Commission learned that proposed modifications to the rule were discussed at the June 2016 SCAC meeting and subsequently asked the subcommittee members if we could meet with them to further discuss the proposed rule. We are deeply grateful for the SCAC subcommittee's willingness to meet with us and incorporate suggestions as they worked to revise TRCP 183. Their thoughtful approach to addressing language access as both a legal obligation and a critical component of providing equal access to justice in Texas Courts is a view we share and is the guiding principle behind our recommendations.

II. RESEARCH AND METHODOLOGY

In developing our recommendations, we:

- Researched Federal and State law and policy;
- Met with legal aid advocates;
- Had discussions with the Texas Access to Justice Commission Rules and Legislation Committee and Language Access Subcommittee;
- Had two teleconferences with the SCAC subcommittee working on the rule;
- Spoke with Department of Justice Coordination and Compliance Section staff;
- Reviewed information and policies from other states;
- Spoke with a licensed court interpreter and former OCA language access coordinator;
- Reviewed case law; and
- Spoke with language access coordinators and other stakeholders from other states.

Throughout the process, the Subcommittee was mindful of the balance between the revenue needs of counties and the consequences to litigants and witnesses who need interpreter services to have meaningful access the judicial process.

III. RECOMMENDATIONS AND RATIONALE

A. DOJ Policy

The underlying question in the Court's charge on Rule 183 is whether it violates federal civil right laws to charge a party for the cost of an interpreter. Put simply, the answer is yes.

Title VI of the Civil Rights Act of 1964, as amended, and the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Safe Streets Act), both prohibit national origin discrimination by recipients of federal financial assistance.⁸ Title VI and Safe Streets Act regulations prohibit discriminatory

⁶ Members are: Juan Alcala (Chair), Justice Brett Busby, Nelson Mock, Judge Jennifer Rymell, Judge Maria Salas-Mendoza, Brenda Willet, and Veronica Carbajal.

⁷ Letter re Referral of Rules Issues from Chief Justice Hecht to Mr. Chip Babcock, Chair, Supreme Court Advisory Committee (April 18, 2016), <http://jwclientservices.jw.com/sites/scac/Document%20Library2/1/SCAC-April%2018,%202016%20Referral%20Letter%20with%20Attachments.pdf> (last visited Sep 12, 2016).

⁸ 42 U.S.C. § 2000, *et seq*; 42 U.S.C. § 3789d(c).

conduct such as providing a service or benefit that is different, or provided in a different manner from, what is provided to others under the program or that restricts in any way the enjoyment of any advantage or privilege enjoyed by others under the program based on national origin.⁹ The regulations also prohibit administering programs in a manner that has the *effect* of discriminating in those ways or “substantially impairing accomplishment of the objectives of the program” based on national origin.¹⁰ In *Lau v. Nichols*, the U.S. Supreme Court held that Title VI prohibits conduct that has a disproportionate effect on LEP individuals because such conduct constitutes national origin discrimination.¹¹

In 2000, Executive Order 13166 directed federal agencies to publish guidance for recipients of federal financial assistance regarding their obligation to provide meaningful access to LEP individuals.¹² On June 18, 2002, the Department of Justice (DOJ) issued its final guidance regarding the prohibition against discrimination against LEP persons.¹³ The DOJ’s Guidance was especially attentive to courts and the critical importance of access to justice for LEP individuals.

According to the DOJ, courts must “ensure that LEP parties and witnesses receive competent language services ... At a minimum, every effort should be taken to ensure competent interpretation for LEP individuals during all hearings, trials, and motions during which the LEP individual must and/or may be present.”¹⁴ The Guidance also states that recipients should provide interpreters free of cost and says, “this is particularly true in a courtroom, administrative hearing, pre- and post-trial proceedings, situations in which health, safety, or access to important benefits and services are at stake, or when credibility and accuracy are important to protect an individual’s rights and access to important services.”¹⁵

Charging parties for language services provides a service or benefit “which is different, or is provided in a different manner, from that provided to others” and restricts the “enjoyment of [an] advantage or privilege enjoyed by others” in the program.¹⁶ In the case of courts, the accomplishment of the objective of the program is also substantially impaired when a party, witness, or other interested person cannot understand or communicate with the court. Their inability to participate in the proceedings denies the LEP person equal access to justice and the judicial process. At the same time, when an LEP person cannot communicate with the court, the judge or jury is prevented from gathering all of the necessary information to render a just decision. It is a lose-lose proposition.

The DOJ emphasizes the importance of providing language services free of charge in courts whenever it addresses the topic. For example, in a 2008 letter to the National Center for State Courts regarding its *Model Judges Bench Book on Court Interpreting*, the DOJ said it

has noted a disturbing number of courts and court systems engaging in a practice of charging LEP persons for interpretation costs—a practice which implicates national origin discrimination

⁹ 28 C.F.R. § 42.104(b)(1) (Aug. 26, 2003).

¹⁰ 28 C.F.R. §§ 42.104(b)(2), 42.203(e).

¹¹ 414 U.S. 563 (1974).

¹² 65 Fed. Reg. 50,121 (Aug. 16, 2000).

¹³ 67 Fed. Reg. 41,455 (June 18, 2002).

¹⁴ *Id.* at 41,471.

¹⁵ *Id.* at 41,462.

¹⁶ 28 C.F.R. § 42.104(b)(1).

concerns. DOJ's Guidance focuses on a huge range of types of recipients. The consequences of lack of access to some of these programs is much greater than others ... In this context, nearly every encounter an LEP person has with a court is of great importance or consequence to the LEP person. Thus, the Guidance emphasizes the need for courts to provide language services free of cost to LEP persons.¹⁷

The letter further explains:

We therefore think that the legally sound approach to providing access to LEP persons can be found in states in which courts are providing interpretation free of cost to all LEP persons encountering the system (including parents of non-LEP minors), whether it be in a criminal or civil setting. In addition, courts should be providing translation of vital documents and signage.¹⁸

Another example arose in 2009 when the DOJ wrote to the Indiana Division of State Court Administration in response to an Indiana Supreme Court case holding that an LEP defendant was not entitled to a free interpreter unless indigent. In that letter, the DOJ restated its expectation that courts provide interpreters free of charge to all LEP persons in criminal and civil settings, and added that free interpretation is also necessary "in important interactions with court personnel."¹⁹ For illustrative purposes, the DOJ attached a copy of its Memorandum of Understanding with Maine's Judicial Branch signed just a few months prior to the letter after the DOJ investigated a Title VI complaint concerning Maine's courts. The MOU included an order "ensuring that interpreters will be provided at court cost to all LEP witnesses and parties in all court proceedings."²⁰

The DOJ's 2010 letter to Chief Justices and Administrators of state courts is perhaps the clearest explanation of the prohibition against court policies or practices that have the effect of discriminating against LEP person.²¹ In it, the DOJ lamented that, "Despite efforts to bring courts into compliance, some state court system policies and practices significantly and unreasonably impede, hinder, or restrict participation in court proceedings and access to court operations based upon a person's English language ability."²² The second of the four "examples of particular concern" highlighted in the letter was "charging interpreter costs to one of more parties." It went on to explain that:

Many courts that ostensibly provide qualified interpreters for covered court proceedings require or authorize one or more of the persons involved in the case to be charged with the cost of the interpreter. Although the rules or practices vary, and may exempt indigent parties, their

¹⁷ Letter from DOJ Coordination and Review Section Chief Merrily Friedlander to the National Center of State Courts regarding the *Model Judges Bench Book on Court Interpreting* (Feb. 21, 2008), pg. 3, https://www.lep.gov/guidance/cor_feb_21_2008_letter_to_ncsc.pdf (last visited Sep. 10, 2016).

¹⁸ *Id.* at pg. 4

¹⁹ Letter from Coordination and Review Section Chief Merrily Friedlander to Indiana Div. of State Court Administration re *Arrieta v. State* (Feb. 4, 2009), pg. 2, https://www.lep.gov/whats_new/IndianaCourtsLetterfromMAF2009.pdf (last visited Sep. 12, 2016).

²⁰ *Id.*; Memorandum of Understanding Between the United States of America and The State of Maine Judicial Branch, Department of Justice Number 171-34-8 (2008), pg. 2, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/Maine_MOA.pdf (last visited Sep 10, 2016).

²¹ Letter to State Courts from Assistant Attorney General Thomas E. Perez re Language Access Guidance (Aug. 16, 2010), https://www.lep.gov/final_courts_ltr_081610.pdf (last visited Sep. 12, 2016).

²² *Id.* at pg. 2.

common impact is either to subject some individuals to a surcharge based upon a party's or witness' English language proficiency, or to discourage parties from requesting or using a competent interpreter. Title VI and its regulations prohibit practices that have the effect of charging parties, impairing their participation in proceedings, or limiting presentation of witnesses based upon national origin. As such, the DOJ Guidance makes clear that court proceedings are among the most important activities conducted by recipients of federal funds, and emphasizes the need to provide interpretation free of cost. Courts that charge interpreter costs to the parties may be arranging for an interpreter's presence, but they are not "providing" the interpreter. DOJ expects that, when meaningful access requires interpretation, courts will provide interpreters at no cost to the persons involved.²³

The DOJ's 2010 letter ushered in a new era of Title VI enforcement and collaboration with state courts aimed at increasing meaningful access to court for LEP persons. The DOJ investigated Title VI complaints around the country and worked with several states to reform their policies to comply with Title VI and Safe Streets regulations and DOJ Guidance. Like the 2008 MOU with Maine, the agreements reached in those cases included assurances or revised policies like the one memorialized in the letter concluding the DOJ's "formal engagement" with the Judiciary of the State of Hawai'i:

The Hawai'i State Judiciary is committed to providing meaningful access to court processes and services to persons with limited English proficiency. In all case types, the Judiciary shall reasonably provide, free of charge and in a timely manner, competent court interpreters for parties, witnesses and individuals with a substantial interest in a case. It shall also provide language assistance services at points of contact with the Judiciary, including over-the-counter and over-the-telephone encounters for all Judiciary-related business. The Judiciary shall notify the public of the Judiciary's language assistance commitment.²⁴

Although "DOJ acknowledges that it takes time to create systems that ensure competent interpretation in all court proceedings and to build a qualified interpreter corps,"²⁵ it also expects that states are working diligently to "make progress toward full compliance in policy and practice."²⁶ As discussed, in this case, "full compliance in policy and practice" means providing interpreters and

²³ *Id.*

²⁴ Letter and Agreement re Language assistance services in Hawai'i state courts closing DOJ Complaint 171-21-5 (March 24, 2015), pg. 2-3, [https://www.lep.gov/resources/Hawaii_Closure_ltr\(3%2024%2015\).pdf](https://www.lep.gov/resources/Hawaii_Closure_ltr(3%2024%2015).pdf) (last visited Sep. 12, 2016). *See also* Letter and Agreement re Complaint No. 171-8-23, *Castaneda v. Superior Court of Arizona, Mohave County* (May 11, 2015), pg. 2, [https://www.lep.gov/resources/MohaveAZ_Ltr_FINAL\(5.11.15\).pdf](https://www.lep.gov/resources/MohaveAZ_Ltr_FINAL(5.11.15).pdf) (last visited Sep. 12, 2016); Letter to Colorado State Court Administrator re closing Complaint # DJ 171-13-63 (June 21, 2016), <https://www.justice.gov/opa/file/868651/download> (last visited Sep. 12, 2016); Memorandum from Judge John Smith, Director, North Carolina Administrative Office of the Courts to All Judicial Branch Elected and Appointed Officials (Aug. 16, 2012), http://www.nccourts.org/LanguageAccess/Documents/Foreign_Language_Access_and_Interpreting_Services_Memo.pdf (last visited Sep. 12, 2016); Letter to Supreme Court of Rhode Island re Complaint DJ # 171-66-2 (April 21, 2016), https://www.lep.gov/resources/RI_Jud_Closure_42116.pdf (last visited Sep. 12, 2016); Letter to King County Superior Court, Washington re closing Complaint DOJ # 171-82-22 (Dec. 1, 2015), https://www.lep.gov/resources/20151201_KCSC_Letter_of_Resolution.pdf (last visited Sep. 12, 2016).

²⁵ Letter to State Courts from Assistant Attorney General Thomas E. Perez re Language Access Guidance (Aug. 16, 2010), pg. 4, https://www.lep.gov/final_courts_ltr_081610.pdf (last visited Sep. 12, 2016)

²⁶ *Id.*

other necessary language services to LEP parties, witnesses, and other interested individuals free of charge.

B. Current TRCP 183

TRCP 183 currently allows courts to tax interpreter costs against parties. However, when required for LEP persons to have meaningful access to the courts and the judicial process, language services such as interpreters must be provided free of charge. Consequently, the rule needs revision to comply with law.

C. Proposed Revision of TRCP 183

Because the proposed revision of TRCP 183 is effectively a rewrite, this report addresses each section in turn.

1. **TRCP 183. Interpreters and Translators**

We suggest clarifying that Rule 183 applies to interpreters and translators by changing the rule header to “183. Interpreters and Translators,” and by consistently referencing interpreters and translators throughout the rule. Just as there may be times when oral interpretation is necessary in order for LEP litigants or witnesses to participate in court proceedings, there may also be times when the translation of documents is necessary for the same purpose, though the need for translation will be rarer.

Additionally, courts, like all recipients, are required to translate vital documents.²⁷ The DOJ intends for recipients to do their own self-evaluation to determine which of its documents are “vital,” but court orders are among the examples given.²⁸ There may also be times when translation is needed for an LEP witness to review a document in English or when a foreign language document is crucial evidence as contemplated in Texas Rules of Evidence 1009(g).

2. **Section (a), *Appointed by the court. When needed for effective communication or when required by law, the court must appoint a qualified interpreter or translator for court proceedings involving a party or witness with a communication disability or with limited English proficiency.***

- a. Target Group: The first question the Subcommittee considered was whether the rule applied solely to situations involving a limited English proficient persons or whether it should also apply to those with disabilities who are covered under the American with

²⁷ 67 Fed. Reg. 41,464.

²⁸ Language Access Planning and Technical Assistance Tool for Courts (February 2014), pg. 13, https://www.lep.gov/resources/courts/022814_Planning_Tool/February_2014_Language_Access_Planning_and_Technical_Assistance_Tool_for_Courts_508_Version.pdf (last visited Sep. 12, 2016).

- Disabilities Act. The Subcommittee believes that the rule should apply to both LEP individuals and persons with disabilities because the current rule 183 applies broadly to the appointment of any interpreter, including ASL interpreters. LEP individuals and persons with disabilities are also the groups most likely to need interpreters. Specifying these groups within the rule itself encourages courts, lawyers, and others to consider whether an interpreter is needed when a case involves LEP individuals or persons with disabilities. In other words, making the rule specific in this way helps sensitize the legal community to the issue of access to the judicial process for LEP individuals and persons with disabilities.
- b. Parties and Witnesses: The Subcommittee also looked at whether the rule applied only to parties or if it also applied to witnesses. We believe the regulations and DOJ Guidance make it clear that interpreter services should be provided to both parties and witnesses.²⁹ We recommend that the rule state its applicability to parties and witnesses to clarify the issue for parties and judges. Making this aspect of the rule clear will help minimize problems and will help self-represented litigants understand the rule better.
- c. Effective Communication: The committee thought it would be helpful to parties and judges to have guidance about when an interpreter is necessary. “Effective communication” is a commonsense standard that is easy for parties and judges to understand, and it is the language that the DOJ uses when describing when a person with a disability is entitled to use an auxiliary aid or service such as interpreter or CART.³⁰ It has also been used in the context of Title VI.³¹ Because the use of sign language interpreters has become commonplace in Texas courts, we believe including the “effective communication” standard will help judges and parties determine when they need to use an interpreter.
- d. “May” vs. “Must”: In situations where an interpreter is needed for effective communication, it is clear that the appointment of an interpreter is mandatory, not permissive, and we feel that this requirement should be reflected in Rule 183. For example, the ADA has long required government entities, including courts, to use interpreters to ensure access to courts for people with disabilities.³² With respect to LEP individuals, as discussed, the DOJ regulations require that “every effort should be taken to ensure competent interpretation for LEP individuals during all hearings, trials, and motions,” including administrative court proceedings. The DOJ expects that, when meaningful access requires interpretation, courts will provide interpreters at no cost to the persons involved.³³ Again, to avoid confusion amongst courts and parties, including self-represented litigants, the rule should be clear that courts have an obligation to appoint an interpreter when an

²⁹ 67 Fed. Reg. 41,471.

³⁰ 28 C.F.R. Part 35, § 35.160 (January 26, 1992).

³¹ See, e.g. 67 Fed. Reg. 41,466, 41,468-41,469, and 41,471.

³² 28 C.F.R. Part 35, § 35.160(b)(1).

³³ Letter to State Courts from Assistant Attorney General Thomas E. Perez re Language Access Guidance (Aug. 16, 2010), pg. 2, https://www.lep.gov/final_courts_ltr_081610.pdf (last visited Sep. 12, 2016).

LEP person or person with a disability needs one to communicate effectively and have equal access to the judicial process.

- e. Required by Law: The Subcommittee wanted to ensure that any revision of TRCP would not diminish any rights under state or federal law. For example, §57.002 of the Texas Government Code addresses when a court must appoint a licensed court interpreter and the Americans with Disabilities Act imposes its own requirements. Including “required by law” here makes it clear that courts may be subject to other legal requirements with respect to the appointment of interpreters and that this rule is not intended to negate those in any way. Further, should the law in this area change, including “required by law” allows the rule to automatically expand to include those changes without requiring repeated revisions.

3. **Section (b), Definitions.**

(1) Court proceeding. Court proceeding includes the proceedings listed in §57.001(7) of the Texas Government Code.

The Legislature included this definition in the statute governing appointment of interpreters. The broad definition of court proceedings is also consistent with DOJ guidance indicating that equal access for LEP individuals and people with disabilities also includes contact with the judicial process that take place outside the courtroom, including all court-annexed and court-mandated activities.³⁴

(2) Communication disability. Communication disability means a disability that inhibits the individual’s comprehension of the proceedings or communication with others.

Using the term “communication disability” places a reasonable limit on the types of disabilities that might cause a person to need an interpreter for effective communication. It is the terminology used by the DOJ when discussing the obligation to provide auxiliary aids and services such as interpreters under the ADA.³⁵

(3) Limited English proficiency. Limited English proficiency means that the person does not speak English as a primary language or has a limited ability to read, write, speak, or understand English.

³⁴ 67 Fed. Reg. 41,471; *Id.* at 41,459, n. 5; Letter to State Courts from Assistant Attorney General Thomas E. Perez re Language Access Guidance (Aug. 16, 2010), pg. 2, https://www.lep.gov/final_courts_ltr_081610.pdf (last visited Sep. 12, 2016).

³⁵ 28 C.F.R. Part 35, §35.160.

This definition is from the DOJ's 2002 Guidance.³⁶ Including it will help judges determine who is entitled to an interpreter.

- (4) *Qualified.* Qualified means a competent interpreter or translator who is licensed or certified when available or required by law. When the court may appoint an interpreter or translator who is not licensed or certified, the interpreter or translator must**
- a. qualify as an expert under the Texas Rules of Evidence;**
 - b. be at least 18 years of age;**
 - c. not be a party; and,**
 - d. unless agreed by all parties and approved by the court, not be a witness, a relative of a party or witness, or a counsel in the proceeding.**

The DOJ Guidance is clear that competent language service providers are required to provide meaningful access to LEP individuals.

When providing oral assistance, recipients should ensure competency of the language service provider ... Competency requires more than self-identification as bilingual. Some bilingual staff and community volunteers, for instance, may be able to communicate effectively in a different language when communicating information directly in that language, but not be competent to interpret in and out of English. Likewise, they may not be able to do written translations ... When using interpreters, recipients should ensure that they: Demonstrate proficiency in and ability to communicate information accurately in both English and in the other language and identify and employ the appropriate mode of interpreting (e.g., consecutive, simultaneous, summarization, or sight translation); Have knowledge in both languages of any specialized terms or concepts peculiar to the entity's program or activity and of any particularized vocabulary and phraseology used by the LEP person; and understand and follow confidentiality and impartiality rules to the same extent the recipient employee for whom they are interpreting and/or to the extent their position requires[;] Understand and adhere to their role as interpreters without deviating into a role as counselor, legal advisor, or other roles (particularly in court, administrative hearings, or law enforcement contexts).³⁷

The DOJ guidance also recognizes that competence is context specific and favors certified interpreters in certain settings such as courts: "Where individual rights depend on precise, complete, and accurate interpretation or translations, particularly in the contexts of courtrooms and custodial or other police interrogations, the use of certified interpreters is strongly encouraged."³⁸ Requiring courts to use a licensed court interpreter when one is

³⁶ 67 Fed. Reg. 41,459.

³⁷ 67 Fed. Reg. 41,461.

³⁸ *Id.*

available helps provide meaningful access to Texas courts for LEP persons consistent with DOJ guidance.

Additionally, there are times when existing law requires appointment of a licensed or certified interpreter. For example, current Texas law requires that sign language interpreters who interpret in Texas courts be certified.³⁹ Similarly, §57.002 of the Texas Government Code requires appointment of licensed interpreters in certain situations.⁴⁰ Adding the provision that courts use licensed or certified interpreters “when required by law” will help avoid a conflict with existing law or the diminishment of any rights LEP individuals or people with disabilities already enjoy. It will also allow for the rule to incorporate changes in the law without requiring an immediate revision.

In situations where a licensed or certified interpreter is not required by law and is not available, minimum standards of competence are needed to provide meaningful access to the courts for LEP persons and to comply with DOJ Guidance.⁴¹ Including the minimum standards in (4)b helps protect an LEP person’s right to competent interpretation. In fact, (4)b.i-iii are the existing minimum requirements for unlicensed interpreters in Texas courts pursuant to §57.002(e). Unfortunately, many lawyers, judges, and self-represented litigants are not aware of these minimum requirements and are appointing interpreters who do not meet the minimum standards in §57.002(e). Including these minimum requirements in the rule will help ensure that courts are appointing competent interpreters.

The Commission also learned that courts are using children, opposing parties, and various types of bystanders as interpreters without regard for their qualifications or impartiality. The inclusion of (4)b.iv would help avoid some of the most egregious situations while still preserving the court’s discretion if the parties agreed to allow one of the listed individuals interpret.

5. Section (c), *Payment of Fees.*

(1) *Reasonable Compensation.* When appointing an interpreter or translator, the court shall determine a reasonable fee for the interpreter’s or translator’s services.

This is in the current rule.

(2) *Fees Taxed as Costs.* At the request of the clerk or on motion of any party or on the court’s own motion, the court may tax as court costs the reasonable fee of an

³⁹ Tex. Civ. Prac. & Rem. Code § 21.003.

⁴⁰ Tex. Gov. Code §57.002. *See also* Texas Attorney General Opinion No. JC-0584 (Nov. 26, 2002), <https://texasattorneygeneral.gov/opinions/opinions/49cornyn/op/2002/htm/jc0584.htm> (last visited Sep. 12, 2016) (“[s]ection 57.002 clearly modifies the authority of a court to determine the qualifications of an interpreter.”)

⁴¹ 67 Fed. Reg. 41,461.

appointed or privately retained interpreter or translator utilized during court proceedings. Fees of interpretation or translation services provided through the court or otherwise paid for with public funds must not be taxed as costs.

The ability to tax interpreter fees as costs is in the current rule.

(3) *When Fees May Not be Taxed as Costs.* In no case shall the court tax these fees as costs against:

- i. A party with a communication disability when the services were needed for effective communication;**

The Americans with Disabilities Act and Chapter 121 of the Texas Human Resources Code prohibit charging a person with a disability for an interpreter or other auxiliary aid or service that she needs for effective communication.⁴²

- ii. A party unable to afford payment of costs under Rule 145;**

Texas Rule of Civil Procedure 145 prohibits the court from taxing costs against a person who is unable to afford the payment of fees and has filed a Statement of Inability to Afford Payment of Court Costs.⁴³ However, over the years there has been a lot of confusion over what costs are included in the waiver of fees under TRCP 145, so it is important to be very clear that these costs will not be taxed against these individuals.⁴⁴

- iii. A party with limited English proficiency, unless the court finds in writing the party can easily afford the costs and the costs will not impede the party's access to the judicial process; or**

As discussed earlier in this report, Title VI, the Safe Streets Act, and their implementing regulations, as well as DOJ Guidance are clear that interpreters and other necessary language services must be provided to LEP persons free of charge. This section departs from the DOJ's mandate that LEP parties not be charged and allows costs to be taxed against LEP parties as long as that party is easily able to afford it and it does not compromise the party's ability to access the courts.

- iv. A party who can otherwise not easily afford the costs and the costs may impede the party's access to the judicial process.**

⁴² 28 C.F.R. Part 35, §35.130(f); Tex. Hum. Res. Code § 121.003(d)(3). See also Tex. Civ. Prac. & Rem. Code § 21.006(c).

⁴³ Tex. R. Civ. Proc. 145(a) (including "fees for a court-appointed professional" in the "costs" that are waived for qualifying parties who file a Statement of Inability to Afford Payment of Court Costs).

⁴⁴ See, e.g., *Campbell v. Wilder*, 487 S.W.3d 146, 151 (2016).

This provision is intended to address the barrier that the cost of language services can create even for non-LEP litigants of modest means. According to the ABA,

the poverty/indigency threshold is unrealistically low. For that reason, any effort by a court to impose fees on particular persons and litigants should take into consideration that the cost of interpreter services will burden most people of modest or even “middle class” means, and of many small or moderate-size businesses. Litigants in those categories will not be treated on a par with persons who do not require language services and will effectively be denied access to justice, if they are unable or dissuaded from using the courts, because they are subject to up-front fees or know that they will be assessed fees under an after-the-fact recoupment mechanism.⁴⁵

Without this provision, non-LEP litigants who are low-income but do not meet the TCRP 145 threshold would be required to pay the interpretation costs for their LEP witnesses – for example, the parent of a non-LEP juvenile – even if these costs would impede their access to the judicial system. Conversely, non-LEP litigants who qualify under TRCP 145 would not be required to pay these costs.

In many cases, inability to pay for an interpreter will prevent a modest means individual from presenting their LEP witnesses. If their LEP witness is key to the case, the inability to present their LEP witnesses could prevent them from even pursuing their case or from being able to mount a vigorous defense.

In these circumstances, requiring payment of language services would impermissibly affect the “presentation of witnesses based upon national origin” and could deny the LEP parent of a non-LEP juvenile, for example, the ability to participate in a proceeding where his or her child is a party. The modest means litigant would be denied equal access to justice and the judicial process, and the court would be denied access to the information needed to render a just decision.

Any of these outcomes is not consistent with providing meaningful access to the judicial process for LEP persons. The DOJ’s position is clear: “Courts that charge interpreter costs to the parties may be arranging for an interpreter’s presence, but they are not “providing” the interpreter. DOJ expects that, when meaningful access requires interpretation, courts will provide interpreters at no cost to the

⁴⁵ ABA Standards for Language Access in Courts (Feb. 2012), Standard 2.3 Commentary, pg. 33, http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf (last visited Sep. 12, 2016).

persons involved.”⁴⁶ This provision is a necessary step toward “full compliance in policy and practice.”⁴⁷

6. Section (d), *Services Provided Free of Charge*. The Court shall not tax or assess the fees for interpretation or translation services to individuals listed in (c)(3).

The Commission heard from attorneys whose indigent clients had been required to pay for interpreters in other ways besides the bill of costs. This provision makes it clear that individuals listed in (c)(3) must not be charged by taxing the costs or by any other method.

7. Section (e), *No Delay of Case*. Except on motion by a party with a communication disability or LEP individual, the court may not delay a court proceeding by requiring a party to pay for interpretation or translation services in advance.

The Commission heard from attorneys whose indigent clients’ cases were delayed because they could not pay an interpreter fee in advance of the proceeding. In at least one case, an indigent party was threatened with dismissal of her case if she did not pay the interpreter in advance. This provision makes it clear that courts may not refuse to schedule a proceeding, threaten dismissal, or frustrate the progress of a case by any other means in order to secure payment of interpreter fees in advance of a proceeding.

IV. ADDITIONAL RECOMMENDATION – JUSTICE COURTS

The requirement to provide meaningful access to LEP persons applies in all courts, including justice courts. A revised TRCP 183 will not apply in justice courts unless it is specified in the justice court rules.⁴⁸ We recommend including a provision in the justice court rules stating that TRCP 183 applies in justice courts or repeating the final text of the revised TRCP 183 in the justice court rules.

V. CONCLUSION

The Language Access Subcommittee of the Texas Access to Justice Commission believes that revising TRCP 183 in this way is a substantial step toward full compliance with Title VI regulations and DOJ policy. More importantly, it will help to provide meaningful access to Texas courts for LEP persons.

We welcome the opportunity to discuss these issues with you further or to answer any questions that you have. Thank you for your work on this issue and for your commitment to increasing language access in Texas courts.

⁴⁶ Letter to State Courts from Assistant Attorney General Thomas E. Perez re Language Access Guidance (Aug. 16, 2010), pg. 2, https://www.lep.gov/final_courts_ltr_081610.pdf (last visited Sep. 12, 2016).

⁴⁷ *Id.* at pg. 4.

⁴⁸ Tex. R. Civ. Proc. 500.3(e).